Department of Energy
Richland Operations Office
P.O. Box 550
Richland, Washington 99352

15-ESQ-0121

OCT 0 1 2015

Mr. E. J. Kowalski, Director
Office of Compliance and Enforcement
U.S. Environmental Protection Agency
Region 10
1200 Sixth Avenue, Suite 900, OCE-101
Seattle, Washington 98101

Dear Mr. Kowalski:

COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT (CERCLA) OFFSITE ACCEPTABILITY DETERMINATIONS

References: (1) EPA ltr. to S. Charboneau, RL, from E. J. Kowalski, "60-Day Notice of Unacceptability, United states Department of Energy, Hanford Site, EPA ID #WA7 89000 8967, CERCLA Off-Site Acceptability Determination, 2403-WA and 2402-WB, Buildings, Central Waste Complex," dtd. August 27, 2015.

(2) EPA ltr. to S. Charboneau, RL, from E. J. Kowalski, "United States Department of Energy, Hanford Site, EPA ID #WA7 89000 8967, CERCLA Off-Site Acceptability Determination," dtd. August 27, 2015.

The referenced letters provided the U.S. Department of Energy (DOE) Richland Operations Office (RL) with the Environmental Protection Agency, Region 10's (EPA's) updated acceptability determinations for dangerous waste management units to receive wastes generated at other DOE sites and onsite pursuant to CERCLA, as amended, 42 United States Code (U.S.C) 6901 et seq within the Central Waste Complex (CWC) and the Low-Level Burial Grounds (LLBGs). Reference (1) contained acceptability determinations for the CWC Buildings 2403-WA and 2402-WB, and stated that within 10 days of receipt of the letter, RL could request an informal conference to discuss the basis for EPA's determination. On September 3, 2015, RL staff requested an informal conference via electronic mail, and it is scheduled for October 8, 2015. The attachment contains information RL plans to discuss at the informal conference.

Reference (2) contained acceptability determinations for the CWC East Outside Storage Area, CWC Shipping and Receiving Area, CWC Tank D-10 Storage Area, and LLBG Trench 31 and 34 Storage and Treatment Pads. In that letter, EPA stated it was waiting for a response back from Washington State Department of Ecology related to closure plans, and until EPA can make an affirmative determination that these units were in substantial compliance with applicable federal and state environmental regulations, they will not be considered acceptable for receipt of CERCLA waste.

No 60 day Notice of Unacceptability or offer for an informal conference was made. RL's response is provided in the Attachment.

If you have any questions, please contact me, or your staff may contact Jeffrey A. Frey, Acting Assistant Manager for Safety and Environment, on (509) 376-7727.

Sincerely,

Stacy Charboneau
Manager

ESQ:AKW

Attachment

cc w/attach:
D. B. Bartus, EPA
G. Bohnee, NPT
R. Buck, Wanapum
J. A. Ciucci, CHPRC
D. A. Faulk, EPA
J. A. Hedges, Ecology
S. Hudson, HAB
M. A. Jarasyi, CHPRC
K. Niles, CTUIR
D. Rowland, YN
K. Schnilec, EPA
R. Skeen, CTUIR
Admin Record
Environmental Portal, LMSI, A3-95
HF Operating Record (J.K. Perry, MSA, A3-01)
HF Operating Record (CWC TS-2-4 & LLBG: D-2-9)

Information for Informal Conference on Comprehensive Environmental, Response, Compensation, and Liability (CERCLA) Off-Site Acceptability Determinations

I. Facts

The Central Waste Complex (CWC) in the 200 West Area of the Hanford Site stores containers of mixed low-level waste and transuranic mixed waste in metal buildings and structures, as well as in outdoor storage areas. As of the beginning of September 2015, 7906 drums, 1476 boxes, and 47 other types of containers are being managed at CWC. Since 1987, over 80,000 containers have been managed at CWC. The containers are from various sources including: retrieval from Hanford Site Low-Level Burial Grounds (LLBGs); daughter drums from repackaging activities; waste generated by Hanford Site operations and CERCLA cleanup (e.g., remedial and removal actions); and off-site waste from other U.S. Department of Energy (DOE) sites. Retrieved drums currently in storage were originally placed in the LLBGs in the 1970s. Large scale retrievals occurred from 2004 to 2011 to fulfill requirements of Hanford Federal Facility Agreement and Consent Order (HFFACO) M-091 milestones. The milestones resulted from a settlement agreement resolving U.S. Department of Energy Richland Operations Office's (RL's) appeal of Ecology administrative order No. 03NWPKW-5494.

On April 1 and 2, 2014, U.S. Environmental Protection Agency (EPA) representatives conducted a Resource Conservation & Recovery Act (RCRA) inspection of the CWC. The Washington Department of Ecology (Ecology) personnel accompanied EPA. The purpose of the inspection was, among other purposes, to determine the facility's compliance with its dangerous waste permit. As part of the inspection, containers in several CWC buildings were visually inspected by EPA and Ecology personnel. On April 15, 2014, RL provided the information requested by EPA during the April 1 and 2, 2014, inspection[1].

On March 12, 2015, EPA issued a Notice of Violation (NOV) to RL which alleged various Violations and Areas of Concern identified during the April inspection and later inspections (May 19-21, and July 14-15, 2014)[2]. Specific to its visual inspection of CWC containers in April 2014, EPA alleged (Violation 1 – Container Management at CWC Inside Storage Areas) that it observed violations of 40 CFR 265.171 (incorporated by reference in WAC 173-303-400) in CWC Buildings 2403-WA and 2402-WB[3] because "Numerous containers of dangerous waste ... were not in good condition, in that they were heavily corroded. These were the drums in which the waste had originally been buried and subsequently recovered." Specific containers of concern were not identified, nor were specifics provided on the extent or type of corrosion that was of concern.

The March 12, 2015, EPA letter stated that "Required Action" included the following "the above violations may subject Energy to enforcement action under Section 3008 of RCRA, 42 U.S.C. 6928, including action to assess civil penalties. Within fifteen (15) days of receipt of this NOV,

[1] RL Letter. Stacy L. Charboneau, Assistant Manager for Safety and Environment, to J. L. Boller, U.S. EPA Region 10, "Information Requested in Support of the April 1, 2014, U.S. EPA Treatment, Storage, and Disposal (TSD) Inspection of the Hanford Facility Resource Conservation and Recovery Act Permit: Central Waste Complex (CWC)" 14-ESQ-0073, dtd. April 15, 2014.
[2] EPA Letter, Edward J. Kowalski, to Stacy Charboneau, RL Manager, "Re: Notice of Violation" OCE-127, dtd. March 12, 2015.
[3] Building number "2403-WB" listed in the March 12, 2015 NOV was a typographical error and amended to state 2402-WB in EPA Letter, Edward J. Kowalski, to Stacy Charboneau, RL Manager, "60-day Notice of Unacceptability, U.S. DOE, Hanford Site, EPA ID# WA7 89000 8967, CERCLA Off-Site Acceptability Determination, 2403-WA and 2402-WB, CWC," OCE-101, dtd August 27, 2015.

EPA requests that Energy submit a written response that identifies all actions the Facility has taken or will take to correct the violations described above and the timeframe for completing such action."

RL requested a time extension[4], and subsequently responded to the alleged Violations and Areas of Concerns listed in the March 12, 2015, letter[5]. RL's response to alleged Violation 1 is summarized below:

- DOE and CH2M HILL Plateau Remediation Company personnel did not agree that there were "numerous" "heavily corroded" drums in Building 2403-WA during the April 2014 inspection.
- Building 2402-WB, then and now, continues to contain drums that exhibit exterior corrosion that was on the drums when they were retrieved from the LLBGs over ten years ago.
- RL noted that none of the containers in 2402-WB have leaked during the past decade. RL stated that it would be help to clarify these issues if EPA could identify specific containers it was concerned about.
- RL provided letter 14-AMRP-0169[6], which included a summary of the CWC container management programs, which addresses the condition of drums from exhumation, transport to CWC, acceptance at CWC, management and inspection at CWC, and any additional attention or remedial action needed for drums identified as being at risk of failure of containment.
- RL stated that it is currently in negotiations with Ecology to change TPA Milestone M-091 to address repackaging and treatment of some of the containers that have issues such as corrosion.

For some categories of containers in storage in CWC buildings, like those in 2402-WB, many drums show exterior corrosion due to several decades' of contact with soil under a ground surface that was subject to natural precipitation. However, the contents themselves are not corrosive, and are not in contact with the metal drums. The contents are smaller containers of soil, without free liquids, placed inside a plastic anti-corrosion liner inside each container. The containers have been stored in 2402-WB for a decade or more, and have shown little tendency for external corrosion to expand or deepen. The containers provide containment as intended, and are therefore in good condition and comply with requirements [40 CFR 265.171, and Agreed Order Exhibit A, 1.9.2[7]].

CWC employs a robust inspection and management program for containers that show exterior corrosion, including formal and on-the-job training for inspectors, and evaluators for monitoring changes in corrosion, and flags those containers requiring additional attention and possibly remediation (e.g., overpacking). In addition to the weekly visual inspections conducted as

[4] RL Letter, Stacy Charboneau, Manager, to K. Schanilec, EPA Air-RCRA Compliance Unit, "Notice of Violation, U.S. DOE Richland, Washington, EPA ID Number WA7 89000 8967 Request for Extension," 15-ESQ-0050, dtd. March 31, 2015.
[5] RL Letter, Stacy Charboneau, Manager, to K. Schanilec, EPA Air-RCRA Compliance Unit, "Notice of Violation - U.S. DOE Richland, Washington - EPA ID Number WA7 89000 8967," 15-ESQ-0064, dtd. April 20, 2015.
[6] RL Letter, Matt McCormick, Manager, to J. A. Hedges, Ecology, "Response to State of Washington Department of Ecology Container Integrity Concerns,"
[7] *In Re U.S. AGREED ORDER AND STIPULATED PENALTY No. DE 10156,* dtd January 24, 2014.

required by RCRA, the drums are also inspected periodically using instruments to detect radiation from any leaking of the radioactive contents. This program was described in RL's April 20, 2015, response to the NOV.

To date, EPA has not responded to RL's April 20, 2015, response to the March 12, 2015, NOV. EPA has taken no steps to formally assert a violation of the container condition standard with respect to any specific container. Instead, it appears EPA has skipped the NOV enforcement process, sending a letter[8] (hereafter referred to as Letter #1) notifying RL that beginning October 26, 2015, (sixty days from letter issuance), EPA will no longer consider CWC buildings 2403-WA and 2402-WB to be acceptable for receipt of CERCLA waste "generated at other Energy sites and on-site" unless RL provides EPA information "sufficient to support a determination of acceptability." The cited basis for this decision was alleged Violation 1 contained in the March 12, 2015, NOV constitute "relevant violations" as defined by 40 C.F.R. 300.440(b)(1)(ii). No additional basis was offered, nor has EPA acknowledged RL's NOV response or provided information on why the response was inadequate.

Also, EPA sent a second letter[9] (hereafter referred as Letter #2) declaring that the following dangerous waste management units at CWC and the LLBG are presently not considered acceptable for receipt of CERCLA waste (again, for "wastes generated at other Energy Sites and on-site"):

- CWC East Outside Storage Area (Outside Storage Area D)
- CWC Shipping and Receiving Area (Outside Storage Area E)
- CWC Tank D-10 (Outside Storage Area F)
- LLBG Trench 31 Storage and Treatment Pad
- LLBG Trench 34 Storage and Treatment Pad

In this second letter EPA also claims that the unacceptability determination is effective immediately, without the 60 day grace period and opportunity to contest the determination that is required by the Off-Site Rule regulation (40 CFR 300.440). EPA's basis for the peremptory termination of authorization to receive CERCLA waste being sent "off-site" is that EPA has not received a response from Ecology of its referral to Ecology of a number of "apparent violations of applicable dangerous waste rules" for resolution[10]. No opportunity for RL to appeal or provide information for reconsideration was offered.

The Off-Site Rule at 40 CFR 300.440 does not allow the status of a Treatment, Storage and Disposal (TSD) Unit to be changed from "acceptable" to "unacceptable" without prior notice and opportunity for an informal conference, and taking effect no sooner than 60 days after the notice. The second EPA letter violates the express provisions of the cited regulation, by immediate

[8] EPA Letter, "60-day Notice of Unacceptability, U.S. DOE, Hanford Site, EPA ID# WA7 89000 8967, CERCLA Off-Site Acceptability Determination, 2403-WA and 2402-WB, CWC," Edward J. Kowalski, to Stacy Charboneau, RL Manager, OCE-101, dtd August 27, 2015 (received September 1, 2015).
[9] EPA Letter, "U.S. DOE, Hanford Site, EPA ID# WA7 89000 8967, CERCLA Off-Site Acceptability Determination," Edward J. Kowalski, to Stacy Charboneau, RL Manager, OCE-101, dtd August 27, 2015 (received September 2, 2015).
[10] EPA letter, Edward J. Kowalski, Director, Office of Compliance and Enforcement, EPA Region 10 to Jane Hedges, Program Manager, Washington State Department of Ecology, Nuclear Waste Program, "Referral of Enforcement Matters Relating to EPA Inspection Findings at Hanford," dated June 10, 2013

cessation of receipt of CERCLA waste without an informal conference, and not making a determination based on alleged facts.
On September 3, 2015, the informal conference was requested, and is scheduled for October 8, 2015. In addition to hearing EPA discuss the basis for the underlying violation and relevance to CWC's acceptability to receive CERCLA waste, RL plans to address the following:

- The Definition of Onsite at the Hanford Site.
- The Process followed for EPA in issuing Letters 1 & 2.

Additional information on those topics is provided below.

II. Summary of Argument Related to the Definition of "On-Site" at the Hanford Site

The Off-Site Rule only applies to movement of hazardous wastes that leave what is defined as "on-site". "On-site" is defined as "the areal extent of contamination and all suitable areas in very close proximity to the contamination necessary for implementation of the response action".[11] The term "on-site" is anchored in the CERCLA definition of "facility." The definition of "on-site" encompasses at least as much area as the definition of "facility."

The HFFACO defines the Hanford Site as "the approximately 560 square miles in Southeastern Washington State...which is owned by the United States and which is commonly known as the Hanford Reservation." The Hanford Site, as defined in the HFFACO is identified as the "facility" for purposes of CERCLA. The definition of "on-site" must encompass at least as much land as the definition of "facility". Therefore, the definition of "on-site" includes the 560 square miles of the Hanford "facility." Therefore, the Off-Site Rule only applies to movement of waste to destinations off the Hanford Site.

III. CERCLA

Superfund cleanups concern the removal of wastes from contaminated sites for proper management, including storage, treatment or disposal, at both on-site facilities authorized under CERCLA Sections 104 and 121[12], and at off-site facilities that possess federal and state permits to handle such waste. CERCLA Section 121 specifically preempts permitting and other administrative and procedural requirements for those waste management activities carried out on the CERCLA site. TSD Units that are off the CERCLA site must have permits issued under sections 3004 and 3005 of the Resource Conservation and Recovery Act ("RCRA")[13]. Response actions authorized by CERCLA include both remedial actions and removal actions.[14]

[11] 40 CFR 300.5
[12] 42 U.S.C. 9604 and 9621
[13] 42 U.S.C. §§ 6924-6925
[14] 42 U.S.C. § 9601(25)

IV. DOE has jurisdiction to carry out CERCLA Section 104 response actions at the Hanford Site

Executive Order 12580 "Superfund Implementation" delegates from the President to the Secretary of Energy certain CERCLA Section 104 and 121 response authorities for facilities under DOE jurisdiction, custody, or control. The EPA/DOE/Department of Defense (DOD) "Guidance on Accelerating CERCLA Environmental Restoration at Federal Facilities" (August 22, 1994) reaffirms this point, stating that "federal agencies, other than EPA, have jurisdiction for carrying out most response actions at federal facility sites. As EPA is not the lead agency at such sites, its role is different from that at other Superfund sites." Consistent with Executive Order 12580, the National Contingency Plan (NCP, 40 CFR Part 300) designates DOE as the lead CERCLA agency for responding to hazardous substance releases on, or where the sole source of the release is from, a facility under DOE's jurisdiction, custody, or control. DOE carries out its CERCLA mission using funds specifically appropriated by Congress for DOE site cleanup, and does not expend money from the EPA Superfund. As lead CERCLA agency, DOE is authorized to conduct removal actions, remedial actions, and any other response measures consistent with the NCP. Such response action authority at DOE sites which are listed on the EPA National Priorities List (NPL) must be exercised in accordance with the requirements of Section 120 of CERCLA. While DOE is the lead agency, EPA has retained authority through the HFFACO for certain actions specified in the HFFACO. In the HFFACO the parties have defined the area of the facility for purposes of CERCLA. The area defined as the facility for purposes of CERCLA is used as a basis for determining what is "On-Site" at the Hanford Site for purposes of the Off-Site Rule.

CERCLA Section 121(e)(1) states that permits and other administrative, procedural and enforcement actions based on other environmental regulations are not authorized for remediation that takes place "entirely onsite." Specifically, the statute provides that "[n]o Federal, State, or local permit shall be required for the portion of any removal or remedial action conducted entirely onsite, where such remedial action is selected and carried out in compliance with this section."[15] Section 121(d) establishes a process for identifying substantive Applicable or Relevant and Appropriate Requirements in those other laws which will be incorporated into the design of the cleanup action conducted by DOE. The NCP regulation repeats the "on-site response actions" permit exemption.[16]

The HFFACO repeats this permit exemption. "The Parties recognize that under CERCLA Secs. 121(d) and 121(e)(1), and the NCP, portions of the response actions called for by this Agreement and **conducted entirely on the Hanford Site** are exempt from the procedural requirement to obtain federal, state, or local permits..."[17] [Emphasis added].

This language defining the entirety of the federal facility to be within the "onsite" area under CERCLA Section 121 is not unique to the Hanford Site. It is in fact a standard provision in CERCLA Federal Facility Agreements for DOE and DOD facilities listed by EPA on the Superfund NPL, and was negotiated as part of the original basic agreement reached in 1987

[15] 42 U.S.C. § 9621(e)(1)
[16] Hazardous Substances Response Rules 40 C.F.R. § 300.400(e)
[17] HFFACO at paragraph 63

between HQ EPA, HQ DOE and HQ DOD on how to implement the provisions of CERCLA Section 120 at the dozens of NPL-listed Federal facilities across the U.S. in all EPA regions. Other examples within EPA Region 10 of major NPL-listed Federal facilities which are entirely "onsite" include (a) the Federal Facility Agreement between DOE and EPA governing the cleanup of the Idaho National Laboratory, an 890 square mile Federal facility that is all "onsite" for purposes of Section 121 preemption of permitting requirements[18]; (b) the 4,325 acre Fairchild Air Force Base in Spokane[19], plus the area of groundwater contamination plumes reaching off the base; and (c) the 13,130 acre Elmendorf Air Force Base in Anchorage, Alaska,[20] plus the area of groundwater contamination plumes reaching off the base. These are three examples among many where the CERCLA "site" can be larger than the entire Federal facility, due to the spread of contamination in groundwater, in drainage pipes, and through the air.

V. The Off-Site Rule only applies to movement of hazardous wastes off the Hanford Site

In 1985, the EPA issued its off-site policy,[21] under which off-site facilities were required to have permits or interim status under the RCRA in order to receive wastes from Superfund cleanups. Portions of this policy were codified in the Superfund Amendments and Reauthorization Act of 1986 ("SARA").[22] SARA added section 121(d)(3) of CERCLA, 42 U.S.C. § 9621(d)(3), which established the conditions under which hazardous substances may be transferred from CERCLA sites to off-site facilities for treatment, storage, and disposal. Among other things, the section requires the removal of hazardous waste only to those facilities that operate in compliance with sections 3004 and 3005 of the RCRA, as well as other applicable federal and state laws and regulations.[23] In most states, the state, rather than the EPA, administers the RCRA hazardous waste program. The EPA-authorized state operates its own RCRA program, consisting of state statutes and regulations that must be at least as stringent as the federal scheme.[24] The EPA's role is generally limited to one of oversight.

In 1987, the EPA issued its revised off-site policy, entitled "Revised Procedures for Implementing Off-Site Response Actions" (Nov. 13, 1987). The revised policy incorporated many of the provisions of Section 121(d)(3) of CERCLA. The policy also set forth revised procedures governing how EPA would determine whether an off-site waste management facility is determined unacceptable to continue to process waste. On November 29, 1988, the EPA published its proposed Off-Site Rule for public comment.[25] The proposal generally adopted the

---

[18] The 1991 Federal Facility Agreement for the INL states at C. Permitting, 7.7: "The Parties recognize that under Section 121 (e) (1) of CERCLA, 42 U.S.C. 9621 (e) (1), response actions called for by this Agreement and conducted entirely on the INEL Site are exempted from the procedural requirement to obtain federal, state, or local permits, when such response action is selected and carried out in compliance with Section 121 of CERCLA, 42 U.S.C. 9621."

[19] The 1990 Federal Facility Agreement for Fairchild Air Force Base states at II. Definitions: "(m) 'Site' includes Fairchild Air Force Base ('Fairchild AFB'), including the Craig Road Landfill, which occupies approximately forty-three hundred and twenty-five (4,325) acres twelve (12) miles west of Spokane, Spokane County, Washington, and any off-base area contaminated by the migration of hazardous substances, pollutants, or contaminants from Fairchild AFB .

[20] The 1991 Federal Facility Agreement for Elmendorf Air force Base states at II.(y): "(y) "Site" shall mean the areal extent of contamination and shall include sources of contamination subject to this Agreement at the Elmendorf ("Elmendorf APB"), which occupies approximately thirteen thousand :one hundred and thirty (13,130) acres, bordered by the Municipality of Anchorage, Alaska, to the south . The Site includes any off-base area(s) contaminated by the migration of hazardous substances, pollutants, or contaminants from Elmendorf AFB ;

[21] 50 Fed. Reg. 45,933 (1985)

[22] Pub. L. No. 99-499, 100 Stat. 1613 (1986)

[23] 42 U.S.C. § 9621(d)(3)

[24] 42 U.S.C. § 6926(b)

[25] 53 Fed. Reg. 48,218 (1988)

procedural scheme under the revised policy.[26]

On September 22, 1993, the EPA published the final Off-Site Rule at issue here.[27] Under this rule, either the state or the EPA must first determine that a violation exists at the facility.[28] If the EPA decides the violation is relevant, the EPA issues an initial determination of "unacceptability," 40 C.F.R. § 300.440(c), and must notify the facility.[29] Notice must include the "specific acts, omissions, or conditions which form the basis" of the initial unacceptability determination.[30] The regulatory criteria for acceptability are set forth at 40 C.F.R. § 300.440(b).

The NCP regulation defines "onsite": "The term *on-site* means the areal extent of contamination and all suitable areas in very close proximity to the contamination necessary for implementation of the response action."[31] Exercising its delegated authority under Sections 104 and 121, DOE agreed with EPA in the HFFACO to define the Hanford Site for purposes of all response actions as "the approximately 560 square miles in Southeastern Washington State (excluding leased land, State owned lands, and lands owned by the Bonneville Power Administration) which is owned by the United State and which is commonly known as the Hanford Reservation."[32] The HFFACO also states that the EPA off-site policy, entitled "Revised Procedures for Implementing Off-Site Response Actions" (Nov. 13, 1987) is only applicable for "the shipment or movement of hazardous waste or substances off the Hanford Site".[33]

VI. The Hanford Site is defined as a "facility" under CERCLA and "on-site" encompasses an area at least as large as the "facility"

In the definition section of CERCLA, the term "facility" is defined as "any site, or area where a hazardous substance has been deposited ... or otherwise come to be located."[34] Courts have consistently agreed with this broad interpretation of what constitutes a facility. The words of the statute suggest that the bounds of a facility should be defined at least in part by the bounds of the contamination.[35] The broadest geographical definition of a facility that is appropriate under the specific facts and circumstances of a given case would likely best advance CERCLA's two underlying purposes -- to ensure prompt and efficient cleanup of hazardous wastes sites and to place the costs of those cleanups on the potentially responsible persons.[36] The "Hanford Site" as defined in the HFFACO "constitutes a facility within the meaning of 42 U.S.C. Sec.

---

[26] id.
[27] 58 Fed. Reg. 49,200 (1993)
[28] 40 C.F.R. § 300.440(a)(4), (c)
[29] 40 C.F.R § 300.440(d)(1)
[30] 40 C.F.R. § 300.440(d)(2).
[31] 40 C.F.R. § 300.400(e).
[32] HHFACO Art. V
[33] Id. at paragraph 66
[34] 42 U.S.C. § 9601(9). *Also* "the purpose of the NPL is merely to identify releases of hazardous substances that are priorities for further evaluation. Although a CERCLA "facility" is broadly defined to include any area where a hazardous substance release "come to be located" (CERCLA Section 101(9)), the listing process itself is not intended to define or reflect the boundaries of such facilities or releases." 41000 - 41015 Federal Register / Vol. 54, No. 191 / Wednesday, October 4, 1989 / Rules and Regulations
[35] *See Northwestern Mut. Life Ins. Co. v. Atlantic Research Corp.*, 847 F. Supp. 389, 395-96 (E.D. Va. 1994) ("That ARC leased only a portion of the property is immaterial to defining the scope of the 'facility.' What matters for purposes of defining the scope of the facility is where the hazardous substances were 'deposited, stored, disposed of, . . . or [have] otherwise come to be located.'") (citation and emphasis omitted; alteration in original).
[36] *Cytec Indus. v. B.F. Goodrich Co.*, 232 F. Supp. 2d 821, 835-836 (S.D. Ohio 2002) *See United States v. Akzo Coatings of Am., Inc.*, 949 F.2d 1409, 1416-17 (6th Cir. 1991). The Fifth Circuit has held that an entire subdivision constructed on previously contaminated land was a "facility" under CERCLA. *Tanglewood East Homeowners v. Charles-Thomas, Inc.*, 849 F.2d 1568, 1573 (5th Cir. 1988).

9601(9)[CERCLA]."[37] This approach serves CERCLA's two primary purposes because it avoids piecemeal litigation, encourages a comprehensive remedy which is co-extensive with the entire geographical area affected by a release or threatened release of hazardous substances, and promotes the concept of strict liability which CERCLA incorporates. An area that cannot be reasonably or naturally divided into multiple parts or functional units should be defined as a single "facility," even if it contains parts that are non-contaminated.[38] Furthermore, courts have consistently rejected attempts to create unnatural boundaries between different "facilities" based on legal ownership boundaries.[39]

The interpretation of "facility" is very broad. The definition of "on-site" is "anchored to that area as well."[40] However, the definition of "on-site" is necessarily broader than "facility".

> EPA does not believe that the definition being promulgated today is inconsistent with the statutory definition of "facility" in CERCLA section 101(9). First, Congress did not use the term facility, but rather used the term "on-site," in CERCLA section 121(e)(1). Second, the definitions are not in conflict; the on-site definition is *simply broader in order to allow EPA to effectuate the cleanup of "facilities" defined in the statute.* [Citations omitted][emphasis added][41]

Therefore, the definition of "on-site" encompasses at least as much area as the definition of "facility".[42] In other words, "on-site" is composed of both the "facility" (the area where a hazardous substance has been deposited ... or otherwise come to be located) *and* the area in very close proximity to the contamination that is necessary for implementation of the response.

It should be noted that the position the EPA is taking in this instants is at odds with the position the EPA has taken in other cases. The EPA has consistently argued for a broader interpretation of a CERCLA facility. When conducting a CERCLA site remediation under its own authority the EPA has taken the exact opposite stance of the one taken by Region 10 in this case. That case is quoted at length.

> "Thus, the regulatory regime [NCP] sets forth a flexible approach which focuses above all on the needs of the Agency in conducting the efficient remediation of a contaminated area, and also on the proximity of the proposed facility to the contamination. *See* 40 C.F.R. § 300.400(e); *State of Ohio v. EPA*, 997 F.2d 1520

---

[37] HFFACO Art. XIII FINDINGS AND DETERMINATIONS at 31

[38] *United States v. Township of Brighton*, 153 F.3d 307, 313 (6th Cir. Mich. 1998) *See, e.g., Clear Lake Props. v. Rockwell Int'l Corp.*, 959 F. Supp. 763, 767-68 (S.D. Tex. 1997) (rejecting argument that surface structures constitute separate "facility" from subsurface soil and groundwater); *cf. Northwestern Mutual*, 847 F. Supp. at 396 (counting entire area as "facility," but only because each of its quadrants are contaminated) *Northwestern Mutual Life Ins. Co. v. Atlantic Research Corp.*, 847 F. Supp. 389, 395 (E.D. Va. 1994).

[39] For examples of courts rejecting or criticizing such arguments, *see Clear Lake Props. v. Rockwell Int'l Corp.*, 959 F. Supp. 763, 768 (S.D.Tex. 1997) (rejecting the argument that a laboratory building and the ground upon which it sits constitute two distinct facilities); *Axel Johnson Inc. v. Carroll Carolina Oil Co.*, 191 F.3d 409, 417-18 (4th Cir. 1999) (rejecting argument that tanks and spill areas can be regarded as separate facilities when they are on an area that itself qualifies as a facility); *Thiokol*, 890 F. Supp. at 1043 (noting that "it would be ridiculous to say that each barrel in a landfill is a separate facility").

[40] Ohio v. United States EPA, 997 F.2d 1520, 1549 (D.C. Cir. 1993) "In the definition section of CERCLA, the term 'facility' is defined as 'any site, or area where a hazardous substance has been deposited ... or otherwise come to be located.' (citation omitted). The statute's implicit definition of 'site' in terms of the area of the actual contamination, leads us to conclude that the definition of 'onsite' must be anchored to that area as well."

[41] 55 Fed. Reg. 8666 at 8689 n.3 March 8, 1990

[42] Alternatively, even if the Hanford Site were to be considered noncontiguous facilities the facilities would still be considered reasonably close to one another under the noncontiguous facilities rule. 55 Fed. Reg. 8666 at 8689 and 53 FR 51407

(D.C. Cir. 1993); see generally United States' Memorandum at 46-49; see also, 55 Fed. Reg. 8666, 8688 ('. . . EPA believes that Congress intended to expedite cleanups when it provided for the permit exemption in CERCLA. Requiring the Superfund program to comply with both the administrative requirements of CERCLA and the administrative and other non-substantive requirements of other laws would be unnecessary, duplicative and would delay Superfund activities.')"[43]

***

"The meaning of 'on-site' was the subject of consideration when EPA promulgated the revised NCP containing the present definition. At that time, one public commenter on the proposed language argued that the term 'on-site' should be limited geographically to the '*contiguous* area having the same legal ownership as the actual site of the release [emphasis added in original].' That commenter, like the Town here, feared that the more expansive definition would enable EPA to 'unjustifiably usurp . . . permit[ting] laws.' EPA quite explicitly rejected the commenter's argument:

> EPA disagrees with those commenters who assert that the definition of 'onsite' in the rule is unnecessarily broad. *For practical reasons* . . . on-site remedial actions may, of necessity, involve limited areas of noncontaminated land; for instance, an on-site treatment plant may need to be located above the plume or [as here] simply outside the waste area itself. EPA does not believe that including in the definition of on-site those areas 'in very close proximity to the contamination' and 'necessary for implementation of the response,' is beyond the intent of Congress, or that it would allow the permit exemption in section 121(e)(1) to be used for activities that are that fundamentally different in nature from conventional on-site actions.

55 Fed. Reg. 8666, 8689 (March 8, 1990) [Emphasis and bracketed material added in original. footnote omitted]

This policy was accurately stated, and endorsed, by the court in State of Ohio v. EPA, 997 F.2d 1520 (D.C. Cir. 1993) (ironically, the primary case on which the Town relies):

> CERCLA provides for an overarching framework within which the federal Government, states, and Principal Responsible Parties can respond to hazardous waste releases. The statutory scheme is meant to transcend artificial geographical and legal distinctions in order to facilitate remedial action. [citations omitted in original] The petitioning States ignore this fundamental statutory premise, and rest their definition of "onsite" on precisely the artificial constraints that the statute meant to reject. . . . The NCP definition allows EPA to respond to releases expeditiously and, one would

[43] *United States v. GE*, 460 F. Supp. 2d 395 (N.D.N.Y 2006) *United States Response to Town of Fort Edward's Objection to Consent Decree Based on Section 121(e) of the Comprehensive Environmental Response, Compensation, and Liability Act* at 10.

> hope, efficaciously. It is a definition that reflects the *practical* aspects of responding to hazardous waste releases under various conditions. Id. at 1549 [Emphasis added in original].
>
> Thus, as the D.C. Circuit emphasized, the phrase 'on-site' is to be defined by EPA *contextually* – that is, in a common sense way based on consideration of the needs and the practicalities of the remedy and the particular Superfund site which is to undergo cleanup."[44]

Therefore, the phrase "on-site" is to be defined *contextually* – that is, in a common sense way based on consideration of the needs and the practicalities of the remedy and the particular Superfund site which is to undergo cleanup. The parties to the HFFACO have defined the "facility" for purposes of the response actions taken at the Hanford Site and the definition of "on-site" must meet the needs and practicalities of the remedy for that defined area. More specifically, the HFFACO states that it is only when a hazardous substance or waste is shipped off the Hanford Site[45] that it will be necessary to comply with the Off-Site Rule.[46]

VII. Complying with the HFFACO will expedite the remediation and further the intent of Congress

Following the HFFACO, which all parties agreed to, will further Congress's intent to expedite this cleanup, but complying with the EPA's current interpretation would be unnecessary, duplicative and would delay cleanup. Specifically, if "CWC Shipping and Receiving Area (Outside Storage Area E)" cannot receive CERCLA waste, this could shut down receipt of CERCLA waste to any building at CWC. Currently, the Plutonium Finishing Plant (PFP) removal action has averaged 4 shipments of Transuranic/Transuranic Mixed (TRU/TRUM) debris waste, containing plutonium and americium, per week. Due to limited storage space at PFP, the PFP removal action project, which has an enforceable completion milestone in the HFFACO of September 30, 2016, could only deal with a backlog of waste for approximately one month before the Decontamination and Demolition (D&D) operations would be impacted. Other projects that ship CERCLA waste to CWC include the Pacific Northwest National Laboratory and Washington Closure Hanford LLC (WCH). WCH will send TRUM waste to CWC pending certification and shipment to Waste Isolation Pilot Plant.

Again "Trench 31/34 Storage and Treatment Pads" are the receiving areas for waste being disposed at the trenches. If EPA's letter intends to restrict movement through those areas, then CERCLA waste could not be received. Radioactive Low Level Waste and Mixed Low Level Waste (LLW/MLLW) debris and products from PFP D&D activities are shipped off-site to Permafix Northwest (PFNW) prior to disposal in the Mixed Waste Trenches. Currently, there is one waste package held up at PFNW that is CERCLA waste and scheduled to come to the Mixed Waste Trenches for disposal. PFP also has nine waste packages being prepared for shipment to PFNW for treatment/processing on or before October 22, 2015. PFNW normally will take 2 to 3

[44] Id. at 13-14.
[45] Id.
[46] Id. at paragraph 66

months to process this type of waste; therefore, they are not expected to be sent to the Mixed Waste Trenches until December 2015 or January, 2016.

VIII. Conclusion of the Definition of "On-Site" argument

The purpose of the Off-Site Rule is to prevent a TSD facility from itself becoming a new CERCLA site requiring duplicative expenditures from the Superfund or other Federal agency funds.[47] In this instance, the TSD facility at issue is already on a CERCLA site, one of the largest and most costly in the nation. Application of the Off-Site Rule to this TSD unit will not prevent the creation of an additional CERCLA site and will not minimize future federal liability. Application of the Off-Site Rule in this instance appears pointless. No harm will be prevented. The result will be a slow down or halt to crucial response actions advancing the cleanup of the Hanford Site and missing agreed milestones, which may result in EPA assessing stipulated penalties. CERCLA is meant to empower the President and his delegated agencies to perform expeditious cleanup to protect human health and the natural environment, but this action by EPA is resulting in the exact opposite.

IX. Summary of Procedural Argument

The current EPA action, seeking to block shipment of hazardous waste generated by Hanford Site CERCLA response actions, violates the procedural terms of 40 CFR 300.440, the "offsite rule". EPA has the legal burden of proving, by a preponderance of the evidence, the alleged regulatory violation that is the basis of its action. The EPA has not done so with relation to allegations in Letter #1. Nor has EPA explained how the alleged violations threaten a release to the environment while inside a building. In Letter #2, EPA failed to provide notice of the specific violations which were the basis for the determination. EPA also circumvented its own process by stating that the receiving units could not receive waste effective immediately.

X. Off-Site Rule Process

In 1985, the EPA issued its off-site policy[48], under which off-site facilities were required to have permits or interim status under the RCRA in order to receive wastes from Superfund cleanups. Portions of this policy were codified in the Superfund Amendments and Reauthorization Act of 1986 ("SARA").[49] SARA added section 121(d)(3) of CERCLA, 42 U.S.C. § 9621(d)(3), which established the conditions under which hazardous substances may be transferred by the President from CERCLA sites to off-site facilities for treatment, storage, and disposal. Among other things, the section requires the removal of hazardous waste only to those facilities in compliance with sections 3004 and 3005 of the RCRA, as well as other applicable federal and state laws and regulations.[50] In most states, the state, rather than the EPA, administers the RCRA hazardous waste program. The state operates its own RCRA program, consisting of state statutes and

[47] *Chemical Waste Management, Inc. v. United States EPA*, 673 F. Supp. 1043, 1047 (D. Kan. 1987)
[48] 50 Fed. Reg. 45,933 (1985)
[49] Pub. L. No. 99-499, 100 Stat. 1613 (1986)
[50] 42 U.S.C. § 9621(d)(3)

regulations in lieu of the federal scheme.[51] The EPA's role is generally limited to one of oversight.

In 1987, the EPA issued its revised off-site policy, entitled "Revised Procedures for Implementing Off-Site Response Actions" (Nov. 13, 1987). The revised policy incorporated many of the provisions of section 121(d)(3) of CERCLA. The policy also set forth revised procedures governing whether a waste management facility is determined unacceptable to continue to process waste. On November 29, 1988, the EPA published its proposed off-site rule for public comment.[52] The proposal generally adopted the procedural scheme under the revised policy.[53]

On September 22, 1993, the EPA published the final off-site rule at issue here.[54] Under this rule, either the state or the EPA makes a finding that a violation exists at the facility.[55] If the EPA decides the violation is relevant, the EPA issues an initial determination of "unacceptability,"[56] and must notify the facility.[57] Notice must include the "specific acts, omissions, or conditions which form the basis" of the initial unacceptability determination.[58] The regulatory criteria for acceptability are set forth at 40 C.F.R. § 300.440(b).

The facility can request an informal conference with the EPA Regional Office within 10 days of the date of the notice to discuss the basis for the underlying violation, or may submit written comments within 30 days of that date, or both.[59] If the facility requests a conference, such conference will take place no later than 30 days, if possible, after the date of the notice.[60] No state representative is required to attend the conference, but may voluntarily do so.[61] In this process, the facility bears the burden of proving its acceptability. Unless the EPA determines the information provided is adequate to support a finding of acceptability, the facility becomes "unacceptable" on the 60th day after the initial notice.[62] The EPA Regional Administrator may extend this 60 day period if more time is required to review a submission.[63]

The facility may request, within 10 days, reconsideration by the EPA Regional Administrator.[64] The Administrator has discretion to decide whether the reconsideration should be based on a review of the existing record, an additional conference, or other appropriate means.[65] Finally, a facility found unacceptable may seek to regain acceptability after the relevant violations have been corrected.[66]

---

[51] 42 U.S.C. § 6926(b)
[52] 53 Fed. Reg. 48,218 (1988)
[53] id.
[54] 58 Fed. Reg. 49,200 (1993)
[55] 40 C.F.R. § 300.440(a)(4), (c)
[56] 40 C.F.R. § 300.440(c)
[57] 40 C.F.R § 300.440(d)(1)
[58] 40 C.F.R. § 300.440(d)(2)
[59] 40 C.F.R. § 300.440(d)(4)
[60] id.
[61] id.
[62] 40 C.F.R. § 300.440(d)(6)
[63] 40 C.F.R. § 300.440(d)(8)
[64] 40 C.F.R. § 300.440(d)(7)
[65] id.
[66] 40 C.F.R. § 300.440(f)

XI. Letter #1 Failed to Cite a Proven, Specific and Relevant Violation Under the Off-Site Rule

In the present case, no violations have been proven. On September 15, 2015, a Detailed Facility Report was obtained from EPA's Enforcement and Compliance History Online (ECHO) database for the DOE Hanford Site which included RCRA Regulatory Interests. Under "Informal Enforcement Actions (5 Years)", ECHO lists the March 12, 2015, NOV letter as a "Written Informal" type of action. An "informal" enforcement action under RCRA is broadly defined as "those actions that are not formal actions that notify the violator of its violations." These typically represent written notices to alleged violations prior to filing a civil or administrative compliant, order or agreement. However, an enforcement action's designation as either "formal" or "informal" depends on the type of facility by which the action is being made. For example, Significant Non-Compliers violations are expected to receive "formal" enforcement; however, if a facility is found to be in lesser violation, Secondary Violations, an informal enforcement response is the minimally appropriate enforcement response."[67] Therefore, EPA must conclude the administrative process related to that alleged violation prior to issuing an Unacceptability Determination that relies on that alleged violation.

The allegations of a violation lacked specificity as to what drums were believed to be defective. The alleged violation is not relevant to the Off-Site Rule since there is no threat of a release to the environment. Buildings 2403-WA and 2402-WB were inspected and an allegation of violations has been stated. EPA has requested additional information related to the inspection and DOE has complied by providing that information. However, EPA has not requested a follow up meeting to discuss the information that DOE provided or requested additional information.

EPA has the legal burden of proving, by a preponderance of the evidence, the alleged regulatory violation that is the basis of this action. In this case, EPA has failed to establish that such a violation actually occurred. EPA has not even specifically identified any container that is not "in good condition." EPA has not proven its allegation that containers in the named storage buildings are in violation of the standard. Therefore, there is an appearance that EPA intends to circumvent the enforcement process which would be a denial of due process of law. Such an action would appear to be arbitrary, capricious, without reasonable basis in fact and not in accordance with law, including the Off-Site Rule regulation.

A standard that is not part of published law or regulation is not legally enforceable, because it fails to give regulated persons fair notice of the standards, and thus violates due process of law. Neither Ecology nor EPA has articulated with specificity what "good condition" of a container means, beyond the plain meaning of the term. In contrast, Hanford has a training program that includes written material and photographs and personal instruction by experienced inspectors, teaching inspectors about the kinds of defects that impair the ability of a waste container to perform its function, as well as an active program to identify and remediate containers that we have identified as being at risk, which does operate to divert containers into

[67] U.S. EPA, Office of Enforcement and Compliance Assurance, "Informal and Formal Actions Summary of Guidance and Portrayal on EPA Websites," dtd July 1, 2010

overpacks or repackaging of contents. The regulatory standard is not "perfect condition," or "rust free condition," but a condition that will continue to safely contain the waste.

Additionally, the specific violation must be a "relevant" violation in order for the EPA to determine that a receiving unit is unacceptable. A relevant violation includes "significant deviations from regulations, compliance order provisions, or permit conditions designed to: ensure that CERCLA waste is destined for and delivered to authorized facilities; prevent releases of hazardous waste, hazardous constituents, or hazardous substances to the environment".[68] In this case, the drums of concern are in a building with secondary containment. There has not been an allegation that the building is defective and may allow releases to the environment. In reviewing the history of the management of the drums, EPA will also see that the failure rate of the drums is exceedingly low. As noted above in Section I, Facts, there have been no significant leaks from these containers in over ten years of storage, consistent with the fact that the contents of each drum are smaller containers of dry soil, packed inside a corrosion-resistant plastic inner drum that prevents internal corrosion of the steel drums. There simply is not a threat of release to the environment in this case. Therefore, there is no risk that would be exacerbated by the addition of CERCLA waste into these buildings.

XII. Letter #2 Failed to Cite a Proven, Specific and Relevant Violation Under the Off-Site Rule and Circumvented the Off-Site Rule Process by Immediately Denying Receipt of Waste

In Letter #2 EPA claimed that, due to the failure of Ecology (not DOE) to respond to EPA's referral of several TSD units for closure, "Until such time as EPA can make an affirmative determination that these dangerous waste management units are in substantial compliance with applicable federal and state environmental regulations, they will not be considered acceptable for receipt of CERCLA waste."

This is contrary to the Off-Site Rule, which states that EPA can only make a determination of unacceptability based on specific findings of "significant deviations from regulations."[69] EPA is claiming it can revoke authorization without identifying a specific, relevant violation. A facility bears the burden of proving its acceptability, but only after a violation has been proven. EPA has the legal burden of proving, by a preponderance of the evidence that a regulatory violation has occurred.

This is not the first time that EPA has tried to shifts its burden of proof to a facility. In *Chemical Waste Management, Inc. v. United States EPA*, the EPA tried to apply a standard by which a facility is ineligible to receive CERCLA wastes when the evidence is insufficient to rule out the existence of a release.[70] In other words the EPA tried to require that the facility had to prove that there were no violations, rather than putting the burden on the EPA to prove there were

[68] 40 C.F.R. § 300.440(b)
[69] 40 CFR 300.440(b)(1)(ii)
[70] *Chemical Waste Management, Inc. v. United States EPA*, 673 F. Supp. 1043, 1056 (D. Kan. 1987)

violations. The Court agreed that application of the Off-Site Policy in that way was impermissibly vague and violative of due process.[71]

Furthermore, even when EPA has made a specific factual determination and given notice of unacceptability (which it has not done here), the TSD facility can continue to receive CERCLA waste for 60 days after EPA issues notice of unacceptability. The only basis for an "immediate" effectiveness of unacceptability is "in extraordinary situations such as . . . emergencies at the facility of egregious violations."[72] That clearly does not apply here. Thus, EPA's purported prohibition on receiving CERCLA waste from "off-site," is prima facie a violation of 40 CFR 300.440.

XIV. Conclusion of Off-Site Rule Discussion

The purpose of the Off-Site Rule is to prevent a TSD facility from itself becoming a new CERCLA site.[73] That is why the Off-Site Rule defines "relevant" violations as ones that could allow a release to the environment. When promulgating the Off-Site Rule, the EPA stated that a relevant violation "will generally be Class I violations by high priority violators (HPVs). Guidance for determining what is a Class I violation or HPV can be found in the Revised RCRA Enforcement Response Policy (OSWER Directive No. 9900.0-1A)."[74] Class I violations are defined as:

"Deviations from regulations, or provisions of compliance orders, consent agreements, consent decrees, or permit conditions which could result in a failure to:

a) Assure that hazardous waste is destined for and delivered to authorized treatment, storage or disposal facilities (TSDFs); or
b) Prevent releases of hazardous waste or constituents, both during the active and any applicable post-closure periods of the facility operation where appropriate; or
c) Assure early detection of such releases; or
d) Perform emergency clean-up operation or other corrective action for releases"[75]

There has not been a suggestion in either of the EPA letters that the alleged violations could cause a release to the environment. EPA has not made a legally definitive finding that a relevant violation has occurred, has not been specific as to the alleged violation, has not followed the Off-Site Rule Policy, has not allowed due process to occur and has interpreted this policy in an arbitrary way. DOE respectfully suggests EPA rescind the referred to letters.

---

[71] id.
[72] 300.440(d)(9)
[73] 58 FR 49200 September 22, 1993
[74] id. at 49208
[75] Revised RCRA Enforcement Response Policy (OSWER Directive No. 9900.0-1A)